



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket Nos. FWS–R1–ES–2012–0017; FWS–R1–ES–2013–0012]

[4500030113]

RIN 1018–AX72; 1018–AZ54

Endangered and Threatened Wildlife and Plants; Threatened Status for *Eriogonum codium* (Umtanum Desert Buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs Bladderpod) and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; revision.

SUMMARY: We, the U.S. Fish and Wildlife Service, affirm our determination to list *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod) as threatened under the Endangered Species Act

of 1973, as amended (Act). This affirmation of a previously published final rule implements the Federal protections provided by the Act for these species. We also affirm our designation of critical habitat for Umtanum desert buckwheat and revise our designation of critical habitat for White Bluffs bladderpod under the Act. In total, approximately 344 acres (139 hectares) are designated as critical habitat for Umtanum desert buckwheat in Benton County, Washington, and approximately 2,033 acres (823 hectares) are designated as critical habitat for White Bluffs bladderpod in Franklin County, Washington.

DATES: This rule is effective December 20, 2013. This document also confirms that the listing rule that published at 78 FR 23984 on April 23, 2013, and the critical habitat rule for Umtanum desert buckwheat and White Bluffs bladderpod that published at 78 FR 24008 on April 23, 2013 (which is amended by this rule), are effective December 20, 2013.

ADDRESSES: This affirmation and revision, comments and materials received on the proposed rule, as well as some of the supporting documentation used in preparing this document, are available on the Internet at <http://www.regulations.gov> and at <http://www.fws.gov/wafwo/HanfordPlants>. All of the documents are also available for public inspection, by appointment, during normal business hours, at U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive, SE, Suite 102, Lacey, WA 98503–1263; (360) 753–9440 (telephone); (360) 753–9008 (facsimile).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at http://www.fws.gov/wafwo/Hanford_Plants/FLFCH.html, at <http://www.regulations.gov> at Docket No. FWS–R1–ES–2013–0012, and at the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Ken S. Berg, Manager, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive, Suite 102, Lacey, Washington, 98503–1263, by telephone (360) 753–9440, or by facsimile (360) 753–9405. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

This document is an affirmation of the listing of *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod) as threatened species and a final revised rule to designate critical habitat for Umtanum desert buckwheat and White Bluffs bladderpod under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA or Act). Under the Act, a species warrants protection through listing if it is currently, or is likely to become, in danger of

extinction throughout all or a significant portion of its range and any species that is determined to be an endangered or threatened species requires that critical habitat be designated, to the maximum extent prudent and determinable. Listing a species as an endangered or threatened species and designations and revisions of critical habitat can be completed only by issuing a rule.

We previously published final rules to list Umtanum desert buckwheat and White Bluffs bladderpod (78 FR 23984) and designate critical habitat for both species (78 FR 24008) on April 23, 2013, with effective dates of May 23, 2013. However, on May 23, 2013, we delayed the effective dates of the final rules until November 22, 2013 (78 FR 30772). On November 22, 2013, we further delayed the effective dates of the final rules until December 20, 2013 (78 FR 70001). The delay in effective dates was necessary to allow us time to follow proper procedure in accordance with 16 U.S.C. 1533(b)(5).

In fulfilling that responsibility, we decided to accept and consider additional public comments on the rules. Accordingly, on May 23, 2013, we also announced the reopening of the public comment period (78 FR 30839) on the May 15, 2012, proposed listing and designation of critical habitat for the Umtanum desert buckwheat and White Bluffs bladderpod (77 FR 28704). Newspaper notices inviting general public comment were published in the Tri-City Herald and Walla Walla Union in Washington during the reopening of the public comment period. On June 28, 2013, we published a notice announcing two public hearings (78 FR 38895). We held one public hearing in Kennewick, Washington, and one in Pasco, Washington, on July 11, 2013. The second comment period closed July 22, 2013. Since the reopening of the comment periods, we have taken the necessary actions required by 16 U.S.C. 1533(b)(5).

Purpose of This Document

This document describes the public comments received during the second public comment period, which opened May 23, 2013, and closed July 22, 2013 (78 FR 30839), and affirms our previous listing determination (78 FR 23984). This document also affirms the April 23, 2013, final critical habitat rule for the Umtanum desert buckwheat and revises the April 23, 2013, final critical habitat rule for the White Bluffs bladderpod (78 FR 24008). A revised map of our critical habitat designation for White Bluffs bladderpod based on new information that we received during the second public comment period and additional analysis of the areas previously identified as critical habitat is included in this rule.

In this document, we will discuss only those topics directly relevant to comments received during the second public comment period and the information that we used to update the map of the White Bluffs bladderpod critical habitat designation. Additional information on both species may be found in the Candidate Notice of Review, which was published October 26, 2011 (76 FR 66370); the proposed rule, which was published May 15, 2012 (77 FR 28704); and the final rule, which was published April 23, 2013 (78 FR 23984). Additional information regarding the critical habitat designations for Umtanum desert buckwheat and White Bluffs bladderpod may be found in the April 23, 2013, final critical habitat rule (78 FR 24008).

Listing Affirmation

Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) Destruction, modification, or curtailment of its habitat or range; (B) Overuse; (C) Disease or predation; (D) Inadequate existing regulations; or (E) Other natural or manmade factors. We have determined that Umtanum desert buckwheat is threatened by wildfire, nonnative plants, seed predation, small population size, limited geographic range, and low recruitment. White Bluffs bladderpod is threatened by wildfire, excess groundwater-induced landslides and slope failure, harm by recreational activities and off-road vehicle use, nonnative plants, small population size, and limited geographic range.

Peer Review and Public Comment

We previously sought comments from independent specialists to ensure that our listing determination is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our May 15, 2012, proposed rule (77 FR 28704), and we summarized their comments in the final rule published April 23, 2013 (78 FR 23984). We also considered all comments and information received during the first public comment period and summarized these comments in the final rule published April 23, 2013 (78 FR 23984). We sought additional comments and information during the second public comment period and have summarized these comments in this final rule.

Summary of Comments and Recommendations

During the reopened comment period for the proposed rule, we received 8 comment letters directly addressing the proposed listing of Umtanum desert buckwheat with threatened status and 87 comment letters directly addressing the proposed listing of White Bluffs bladderpod with threatened status. We also received a comment letter from one Federal agency regarding the proposed listing of White Bluffs bladderpod. We did not receive any State agency comments. During the July 11, 2013, public hearings, 40 individuals or organizations made comments on the proposed rule. We received 2 comments in support of the rule, 67 comments in opposition to the rule, and several comments that did not express support or opposition to the rule. All substantive information provided during the comment periods is addressed below.

Federal Agency Comments

(1) *Comment:* The Bureau of Reclamation in addition to several other commenters questioned whether irrigation is the primary cause of landslides that have been identified as a primary threat to the White Bluffs bladderpod. The Bureau of Reclamation believes uncertainty remains concerning whether irrigation is a primary threat.

Our Response: As we previously discussed under Factor A in the final listing rule (78 FR 23984), our review of the literature from 1972 to 2010 indicates that the science is clear regarding the role of excess groundwater in facilitating landslides and slumping in the White Bluffs area. No evidence was found in the literature to dispute or cast doubt on

this relationship. Due to the siting of the Hanford nuclear complex, this area has undergone extensive hydrogeologic and seismic research, which supports our conclusion.

(2) *Comment:* The Bureau of Reclamation requested that efforts to minimize groundwater contribution to the White Bluffs be considered in an appropriate historical and technical context with respect to threats from the current projects related to irrigation facilities, operations, and practices.

Our Response: We considered all appropriate historical and technical data in our analysis of threats to the White Bluffs bladderpod in the final rule (78 FR 23984). Our response to comment (3), below, contains an accounting of the efforts of the Bureau of Reclamation to reduce the threat to the subspecies.

(3) *Comment:* The Bureau of Reclamation and two irrigation districts stated that the proposed rule does not adequately acknowledge the extensive system of surface and subsurface drains in the irrigated lands near the White Bluffs that have been installed to capture, manage, and redirect excess runoff water to reduce the threat of landslides caused by seepage. The Bureau of Reclamation recommended that this information on the existing drainage system and practices should be fully considered and incorporated in the final rule.

Our Response: We agree. Although we were aware of and considered this information, we did not acknowledge these actions in the proposed rule. These actions represent a sizeable contribution to water conservation and a potential reduction of groundwater-related threats to the White Bluffs bladderpod. The Bureau of Reclamation has installed a system of surface and buried drains designed to intercept excess irrigation water and seepage from irrigation conveyances. This system is known to provide some

underground drainage and movement of subsurface waters that could potentially reduce the amount of water that impacts soils and land near the bluffs. Although estimates are available for the quantities of water recovered and reused, the amount of total groundwater budget affected remains unknown. Thus, we are unable to quantify the potential contribution this system may have towards reducing the threat of excess groundwater-induced slides to the White Bluffs bladderpod. We do not have sufficient information at this time to conclude that this system sufficiently removes the threat (see our discussion of groundwater-related threats under **Summary of Factors: White Bluffs bladderpod** in the final rule).

Public Comments

(4) *Comment:* A couple of commenters believed our proposed determination to list both species as threatened was not consistent with the differences in their assigned Listing Priority Number (i.e., LPN 2 for the Umtanum desert buckwheat and LPN 9 for the White Bluffs bladderpod).

Our Response: A Listing Priority Number (LPN) is a species risk assessment that estimates the imminence and magnitude of the threats to a species. The LPN is used to assist in the identification of species that should receive priority review for listing. The determination of threatened or endangered status is based on the best scientific and commercial data available at the time we conduct our status review. The Act defines an endangered species as any species that is “in danger of extinction throughout all or a

significant portion of its range,” and a threatened species as any species “that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.” In our final rule we found that the Umtanum desert buckwheat and the White Bluffs bladderpod are each likely to become endangered throughout all or a significant portion of its range within the foreseeable future but are not in imminent danger of extinction. We have, therefore, determined that listing as threatened is appropriate for both species.

(5) *Comment:* One commenter provided us a recent unpublished genetic analysis titled “Sequence Variation Among *Physaria douglasii* Isolates,” authored by C.L. Anderson, Ph.D., with the University of Idaho Laboratory for Evolutionary, Ecological and Conservation Genetics. A number of commenters asserted that this new analysis establishes that the White Bluffs bladderpod is not a distinct subspecies of *Physaria douglasii*.

Our Response: The genetic analysis (Anderson 2013) used DNA sequence data to investigate the taxonomic status of the White Bluffs bladderpod and concluded that the findings presented in the report did not indicate that *Physaria douglasii* ssp. *tuplashensis* is a distinct subspecies. However, the report states that these results cannot be considered definitive or final due to sampling constraints (Anderson 2013, p. 9). The Service had the genetic analysis report (Anderson 2013) externally peer reviewed given its potential significance to our final listing determination. We requested peer review from five subject and related field experts and received comments from all five reviewers. Their unanimous, independent conclusion was that this analysis was insufficient to warrant a change to the current taxonomic status of White Bluffs bladderpod. All five peer

reviewers indicated that this study was inconclusive as to the taxonomic status of *tuplashensis*. Peer reviewers stated that the genetic markers selected for this study were insufficient for determining differences between closely related taxa in the genus *Physaria*. In addition, all peer reviewers stated that too few samples were collected to adequately characterize genetic diversity and compare *tuplashensis* and *douglasii* under the study design. We find the peer reviewers' critiques of Anderson 2013 to be well-reasoned. Anderson examined only three samples of White Bluffs bladderpod, and he acknowledged that there were "too few samples for statistical validity." Therefore, the Service, consistent with the currently accepted taxonomic status, affirms its previous determination that the White Bluffs bladderpod is a distinct subspecies.

(6) *Comment:* Several commenters stated that our current knowledge of the distribution and habitat preferences of White Bluffs bladderpod is uncertain, such that the Service does not have enough information to assert that this subspecies' range is restricted to a single narrow location less than 11 miles in length. Some of these commenters further stated that there is no updated or more current information to indicate how much of the population still remains on private lands.

Our Response: We disagree that our knowledge of the overall distribution (range) and habitat preferences of the White Bluffs bladderpod is uncertain. In our final rule (78 FR 23984), we provided a detailed description of the habitat preferences of the subspecies, which includes specific geology, soil type, and commonly associated plant species. The areas where these habitat conditions occur were comprehensively surveyed in 1997 by Beck and Caplow (Beck and Caplow 1997) after the discovery of the

subspecies in 1994, and we are confident in our defined range for the White Bluffs bladderpod.

We acknowledge some uncertainty regarding whether the White Bluffs bladderpod still occurs on all of the sites identified as occupied in surveys by Beck and Caplow in 1997. On Federal lands, occupancy on a number of sites has been reconfirmed and these sites are part of an ongoing annual monitoring effort for White Bluffs bladderpod on the Hanford Reach National Monument. However, we agree that no survey data since 1997 are available for private lands. We acknowledge that uncertainty regarding current occupancy is likely highest on sites in the southern part of the White Bluffs bladderpod distribution due to the current threats and condition of the habitat at and adjacent to these sites. Additionally, we have identified several examples of previously occupied sites in this part of the distribution that became unoccupied in the time period between the surveys conducted in 1995 and 1997 by Beck and Caplow (Beck and Caplow 1995, 1997).

Due to this uncertainty, we reassessed all of the sites that were determined to be occupied in 1997 and determined that some of these sites on Federal land, and all of the sites on State and private lands, were likely no longer occupied at the time of listing. However, this conclusion does not alter the threatened status for White Bluffs bladderpod in our final listing determination. This revised determination regarding occupancy is also reflected in our revised final critical habitat designation for White Bluffs bladderpod.

(7) *Comment:* Several commenters said our proposed rule failed to include discussion of other causes of bluff instability (e.g., burrowing by birds or mammals, location in a seismically active part of the State, presence of natural springs). Other

commenters suggested that slope instability is not a threat to White Bluffs bladderpod since the subspecies has historically survived natural slope failure or landslides prior to the introduction of irrigation to the area, and given that the White Bluffs are the boundary to the Columbia River.

Our Response: In our review of literature associated with White Bluffs bladderpod, we did not find any documented loss or disturbance of individual plants or habitat attributable to burrowing by wildlife. The literature clearly indicates that the White Bluffs were slumping prior to the advent of irrigation. Some larger landslides occurred during or immediately following Ice Age floods, but most slumping of the White Bluffs has been documented in the last 30–40 years and the rate of slumping and quantity of groundwater seeping from the cliffs has increased significantly since the arrival of irrigation to the area. White Bluffs bladderpod plants have not been observed in areas that have undergone contemporary landslides, whether moderate or severe. In very large events of rotational slumping or landslides, parts of the original surface horizon may remain somewhat undisturbed on the crest of the slumped block, preserving White Bluffs bladderpod plants, at least for the short term. See our discussion of this threat in the final rule under **Summary of Factors: White Bluffs bladderpod** (78 FR 23984).

(8) *Comment:* A couple of commenters believe the threat of off-road vehicle (ORV) use has been eliminated due to the prohibition of ORVs on the Hanford Reach National Monument and given that much of the area is fenced off. Another commenter asked whether the Service has documentation of the level of ORV use on private lands to

support the statement in our proposed rule that this activity occurs more commonly on private lands.

Our Response: Steps have been taken by the Hanford Reach National Monument to minimize ORV use and close historical points of access. Although some boundary fencing is in place, access by ORVs from outside Federal lands remains possible from adjoining non-Federal ownerships. Our review of June 2013 aerial photos reveals numerous roads and trails connecting Federal and non-Federal lands. We presume these non-Federal lands are used more frequently by ORVs than on the monument because ORV use is currently prohibited on the monument.

(9) *Comment:* A couple of commenters inferred the Service had identified the use of pesticides and herbicides on agricultural lands as a threat to the White Bluffs bladderpod and were concerned about potential restrictions.

Our Response: In our final listing rule, we determined, based on the best available information, that the agricultural use of pesticides and herbicides on lands adjacent to White Bluffs bladderpod is not a threat (see **Summary of Factors: White Bluffs bladderpod** in our final rule (78 FR 23984)). We have no information that would change that conclusion.

(10) *Comment:* One commenter asserted that the Washington State Growth Management Act's (GMA) designation of geologically hazardous areas as "critical areas" would provide adequate protection for the White Bluffs bladderpod without the intervention of the Endangered Species Act. Given the nature of the bluffs, the commenter suggested that it is highly unlikely that any engineering analysis would enable the construction of structures on the bluff. The commenter further asserted that Franklin

County's Critical Area Ordinance (CAO), which relies upon Federal or State-listed endangered, threatened, and sensitive species in designating "Fish and Wildlife Conservation Areas" under the CAO, will provide protections for the White Bluffs bladderpod above and beyond the Endangered Species Act because these protections apply directly to private property. The commenter further stated that, under the CAO, once a "Fish and Wildlife Conservation Area" has been identified on private property, the landowner is required to prepare and submit a habitat management and mitigation plan.

Our Response: Although some protections may be provided to the White Bluffs bladderpod by Washington's GMA and Franklin County's CAO, this protection is not adequate to conserve the subspecies or facilitate recovery because these regulations do not address all the threats identified for this subspecies, such as excess groundwater-induced landslides, ORV use, and introduction of nonnative species. The Service considered the effect of the Washington State GMA and Franklin County's CAO in preparation of the final rule and determined that these regulations do not supply protection sufficient to preclude the listing of the White Bluffs bladderpod.

(11) *Comment:* Several commenters asserted that including the effects of climate change as a significant threat to the White Bluffs bladderpod was inappropriate given that the subspecies has been exposed to and persisted through a range of climatic conditions over thousands of years.

Our Response: Predicting future climate scenarios for specific locations on the landscape remains uncertain. In our final rule we acknowledged this uncertainty and identified climate change as a potential threat based on the available information and determined that more thorough investigations are needed to determine the degree to

which climate change may be affecting the subspecies. In our search of the relevant literature, we were not able to document the occupancy of White Bluffs bladderpod during previous climatic periods.

Determination

We have carefully assessed the comments and additional information provided during the second public comment period. We affirm our finding that Umtanum desert buckwheat and White Bluffs bladderpod are each likely to become endangered throughout all or a significant portion of their ranges within the foreseeable future, based on the immediacy and scope of the threats described in the final rule published on April 23, 2013 (78 FR 23984), and, therefore, meet the definition of threatened species under the Act. Consequently, on the basis of the best available scientific and commercial information, we are affirming the listing of Umtanum desert buckwheat and White Bluffs bladderpod as threatened in accordance with sections 3(20) and 4(a)(1) of the Act.

Critical Habitat Affirmation and Revision

Economic Analysis

Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific and commercial data after taking into consideration the economic impact, national security impact, and any other relevant

impact of specifying any particular area as critical habitat. The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for Umtanum desert buckwheat and White Bluffs bladderpod. Here we are designating a total of approximately 2,377 acres (ac) (962 hectares (ha)) of Federal land as critical habitat for the two species: 2,033 ac (823 ha) for the bladderpod and 344 ac (139 ha) for the buckwheat.

In order to consider economic impacts, we prepared an analysis of the economic impacts of the critical habitat designations and related factors. We announced the availability of the draft economic analysis (DEA) in the May 15, 2012, proposed rule (77 FR 28704), allowing the public to provide comments on our analysis. We announced the availability of the final economic analysis in the April 23, 2013, final rule (78 FR 24008). We received no comments in response to the DEA during the first public comment period. We sought additional comments and information during the second public comment period on the DEA and have summarized these comments in this document.

Peer Review and Public Comment

We previously sought comments from independent specialists to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our critical habitat proposal, and we summarized their comments in the final rule of April 23, 2013 (78 FR 24008). We also considered all comments and information received during the first public comment period and summarized these comments in that final rule. We sought additional

comments and information during the second public comment period on the critical habitat proposal and have summarized these comments in this document. We received no substantive comments on the Umtanum desert buckwheat critical habitat designation and, therefore, reaffirm the designation we initially made on April 23, 2013 (78 FR 24008). The final designation for Umtanum desert buckwheat is entirely on Federal lands (344 ac (139 ha)).

Summary of Comments and Recommendations

We received public comments on the DEA and proposed critical habitat designation during the second public comment period, which was open from May 23, 2013, to July 22, 2013 (78 FR 30839), and during the two public hearings held on July 11, 2013 (78 FR 38895). We received 9 comment letters directly addressing the proposed critical habitat for the Umtanum desert buckwheat and 57 comment letters directly addressing the proposed critical habitat for the White Bluffs bladderpod. We did not receive any State or Federal agency comments. During the July 22, 2013, public hearings, 40 individuals or organizations made comments on the proposed listing and critical habitat rules. We received 2 comments in support of the rule, 54 comments in opposition to the critical habitat rule, and several comments that did not express support or opposition to the rule. All substantive information provided during the comment periods has either been incorporated directly into this final determination or is addressed below.

Public Comments

(12) *Comment:* Several commenters believed some lands included in the proposed designation for the White Bluffs bladderpod were not habitat for the species or did not contain the primary constituent elements (PCEs). In addition, two irrigation districts commented that critical habitat for the White Bluffs bladderpod should not be designated on any Federal rights-of-way used for irrigation because they do not have the PCEs due to past, current, and future types of operation and maintenance activities that occur in these rights-of-way.

Our Response: Section 4 of the ESA requires that we designate critical habitat to the maximum extent prudent and determinable, based on the basis of the best scientific data available. Under the first prong of the ESA's definition of critical habitat, areas within the geographical area occupied by the species at the time it is listed are included in a critical habitat designation if they contain physical or biological features: (1) which are essential to the conservation of the species, and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal PCEs, such as geological formation, specific soil types, vegetation type, and plant pollinators that are essential to the conservation of the species (50 CFR 424.12(b)). Under the second prong of the ESA's definition of critical habitat, we can designate critical habitat in areas outside the geographical area

occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Based on more recent information collected or received during the reopened comment period, we have reanalyzed the proposed designation. Our reanalysis determined that some areas proposed as occupied by the species in our previous final critical habitat rule could not be confirmed to be occupied and did not contain the physical or biological features essential to the conservation of the White Bluffs bladderpod. Because these areas do not meet the definition of critical habitat, they are not included in our final revised critical habitat designation. For more information about how we determined which areas to include in this revised critical habitat designation, please see our discussion below in the **Revisions to Critical Habitat for White Bluffs Bladderpod**).

We also agree that the Federal irrigation rights-of-way do not contain the physical or biological features essential to the conservation of the White Bluffs bladderpod critical habitat and we have removed the rights-of-way, when feasible, from the final designation. For those rights-of-way that we were unable to remove from the map due to practical mapping issues, we do not consider them critical habitat. As stated in the April 23, 2013, final critical habitat rule, critical habitat does not include irrigated private lands or manmade structures (such as buildings, pavement, or other structures) and the land on which they are located (see **Criteria Used to Identify Critical Habitat** and the regulatory text in our final critical habitat rule (78 FR 24008)). Therefore, access roads, irrigation canals, and their related infrastructure are not considered critical habitat.

(13) *Comment:* A couple of commenters questioned whether the Service properly evaluated the need to designate unoccupied critical habitat for the White Bluffs bladderpod. One commenter believed the Service should reexamine its assumptions about pollinators to determine if it is appropriate to designate unoccupied critical habitat based on so little knowledge about their interaction with the White Bluffs bladderpod.

Our Response: Under the second prong of the Act's definition of critical, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. As stated in our April 23, 2013, final rule (78 FR 24008), our evaluation of the best available science indicates that White Bluffs bladderpod is insect-pollinated. To ensure this species' reproduction, it is necessary to maintain sufficient habitat to sustain an active pollinator community. As such, we consider the designated unoccupied critical habitat essential for the conservation of the species because the areas support the habitat requirements of the pollinator species required by White Bluffs bladderpod.

(14) *Comment:* One commenter asserted that private lands were not necessary to conserve the White Bluffs bladderpod given the extensive Federal lands proposed in the designation. One commenter asked whether the Service evaluated the benefits of excluding private property from the designation for White Bluffs bladderpod. Another commenter stated that a private land owner would consider establishing a conservation easement for the White Bluffs bladderpod if the lands were excluded from the final critical habitat designation.

Our Response: We have reassessed our critical habitat designation for the White Bluffs bladderpod based on new information received during the public comment period and the revised designation does not include private lands. Because this revised critical habitat designation no longer includes private lands, comments regarding exclusion of private lands from the designation are no longer relevant; however, a detailed explanation of how we determined which areas to include in this revised designation is provided below in the **Revisions to Critical Habitat for White Bluffs Bladderpod**.

Comments on Economic Analysis

(15) *Comment:* A number of commenters stated that more current land and crop valuation data should have been used in our economic analysis and, therefore, asserted that the economic impacts of the designation were underestimated.

Our Response: The agricultural information we used in our DEA was from the 2009 USDA Census of Agriculture (Census). We must use the best available scientific and commercial information available. The 2009 Census, which is based on data collected during 2007, remains the best source of information available. The Census database, where we obtained this information, is recognized as a national data standard by the USDA. While we understand economic conditions may have changed, the new (2012) Census data have not been released for use by agencies or the public.

(16) *Comment:* Two irrigation districts stated that the economic analysis failed to evaluate the economic impacts of designating critical habitat for the White Bluffs bladderpod on Federal rights-of-way used for irrigation. By designating critical habitat

on these rights-of-way, the potential economic impact would expand to the operation of irrigation and drainage facilities.

Our Response: As we previously discussed under comment (12), we are not aware of critical habitat for the White Bluffs bladderpod existing within Federal rights-of-way. As stated in the April 23, 2013, final rule, critical habitat does not include irrigated private lands or manmade structures (such as buildings, pavement, or other structures) and the land on which they are located (78 FR 24008). We have further refined our maps to remove these areas when feasible. Our best available information indicates that these rights-of-way are linear in nature, disturbed, and generally support nonnative vegetation. As a result, they do not contain the physical and biological features essential to the conservation of the species. Additionally, they are not considered unoccupied critical habitat essential for the conservation of the species because they do not provide native shrub-steppe habitat for pollinators of the White Bluffs bladderpod. These areas, therefore, do meet the definition of critical habitat and are not included in the designation. See the **Revisions to Critical Habitat for White Bluffs Bladderpod** section for more information about how we determined what areas to designate as critical habitat.

Section 7 consultation would be required for Bureau of Reclamation irrigation-related activities that may affect White bluffs bladderpod or its critical habitat. When consulting under section 7(a)(2) of the Act, independent analyses are conducted for jeopardy to the species and adverse modification of critical habitat. Section 7 consultation could identify certain conservation actions needed to ensure that any action authorized, funded, or carried out by the Bureau of Reclamation is not likely to jeopardize the continued existence of White bluffs bladderpod. Conservation actions triggered by the designation of critical habitat alone

would be incremental to the listing determination to ensure the Federal action is not likely to result in the destruction or adverse modification of critical habitat.

For Umtanum desert buckwheat and White Bluffs bladderpod, any adverse modification determination would in most cases result in a jeopardy determination for the same Federal action because of the species' restricted range, and the geographical/ecological relationship between areas proposed as occupied and unoccupied critical habitat. As such, project modifications that may be needed to minimize impacts to the species would also minimize impacts to the associated critical habitat.

Accordingly, although theoretically possible, it is unlikely that an analysis would identify a difference between measures needed to avoid the destruction or adverse modification of critical habitat from measures needed to avoid jeopardizing the species. As a result, based on the best available scientific and commercial information, all economic impacts related to conservation efforts to avoid adverse modification or destruction of critical habitat would be, for the most part, indistinguishable from those related to the listing of these species. Any incremental costs would be limited to additional administrative costs to Federal agencies associated with critical habitat section 7 consultations.

(17) *Comment:* One commenter stated that the economic analysis did not incorporate the economic impacts of possible restrictions and constraints related to the use of pesticides and herbicides or the conduct of other activities on lands adjacent to the critical habitat designation for the White Bluffs bladderpod.

Our Response: As stated in our April 23, 2013, final listing rule (78 FR 23984), the current use of pesticides and herbicides has not been determined to be a threat to the species. Therefore, we do not anticipate restrictions on the use of pesticides and herbicides. Modifications to other activities on land adjacent to the critical habitat

designation may be needed to minimize impacts to critical habitat; however, these modifications would also be needed to minimize impacts to the species. Accordingly, it is unlikely that an analysis would identify a difference between measures needed to avoid the destruction or adverse modification of critical habitat from measures needed to avoid jeopardizing the species. As a result, economic impacts related to conservation efforts to avoid adverse modification or destruction of critical habitat would be, for the most part, indistinguishable from those related to the listing of these species. Any incremental costs would be limited to additional administrative costs to Federal agencies associated with critical habitat section 7 consultations.

New Information Considered

No new information was collected or received for the Umtanum desert buckwheat during the reopened comment period. Therefore, our designation of critical habitat for Umtanum desert buckwheat remains unchanged from the April 23, 2013, final rule (78 FR 24008).

For the White Bluffs bladderpod, more recent imagery from the National Agricultural Imagery Program (NAIP) became available for the area encompassing the range of the White Bluffs bladderpod on June 30, 2013. We also received public comment from a number of landowners indicating that habitat or PCEs for the White Bluffs bladderpod were not present on their land. We conducted site visits to assess presence of habitat for the White Bluffs bladderpod on and adjacent to private parcels at the permission of the landowner. In addition, we used the 2013 Franklin County parcel

data in place of the previously used 2009 Major Public Lands data for more precise ownership data. We found that the new, more precise parcel data did result in some changes to the original distribution of ownerships within our April 23, 2013, final designation. Additionally, we found that we made an error in calculating our acreages reflected in Table 4 of the April 23, 2013, final critical habitat designation (78 FR 24008); we erroneously included 33 ac (13 ha) in the table that were not within the mapped critical habitat designation. The correct total acreage that was previously designated as critical habitat in our map for the White Bluffs bladderpod is 2,828 ac (1,144 ha). The correct distribution of land ownerships depicted on that map is: Federal lands, 2,447 ac (990 ha); State lands, 66 ac (27 ha), and private lands, 315 ac (127 ha).

Revisions to Critical Habitat for White Bluffs Bladderpod

In response to public comment and new information, we have reevaluated our designation of critical habitat for the White Bluffs bladderpod. With these considerations in mind, and using new imagery (NAIP 2013), digitized survey information (USFWS 2011), and new limited site visit information that has become available to us since the publication of the April 23, 2013, final critical habitat rule, we have carefully reassessed all areas within the designation to determine: (1) whether areas identified in the final rule as occupied at the time of listing were in fact occupied by the species, and if so, whether such areas contain the physical and biological features essential to the conservation of the species that may require special management considerations or protection; and (2) whether areas identified as unoccupied at the time of listing are truly essential for the

conservation of the species. Our regulations (50 CFR 424.12(e)) specify that the Service will designate critical habitat outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. Therefore, we give highest priority in our designation to those areas currently occupied by the species, and only designate critical habitat in areas that are currently unoccupied if the designation of those occupied areas is deemed inadequate to provide for the conservation and recovery of the species.

Our reassessment of the critical habitat for the White Bluffs bladderpod across all land ownerships has led us to conclude, as documented in our record, that some areas identified as critical habitat in the April 23, 2013, designation do not meet the definition of critical habitat. Upon closer inspection, based on new information in our record, we concluded that some areas designated as occupied habitat do not contain the physical and biological features essential to the conservation of White Bluffs bladderpod. The new information shows that these areas have been cleared of native vegetation; have extensive invasive, nonnative vegetation; or have experienced recent landslides and associated erosion; and, therefore, the primary constituent elements of critical habitat are no longer present in these areas. Also, based upon our consideration of new information, and reanalysis of existing survey data, we concluded that some areas we initially believed to be occupied at the time of listing were not likely occupied. Using the new information in our record, we determined that a number of survey sites identified as occupied habitat patches in 1997 were not likely to be occupied at the time of listing based on our assessment of the current habitat conditions at these sites and the surrounding areas.

These areas do not meet the definition of critical habitat and have, therefore, been removed from the designation.

In addition, as directed by our implementing regulations at 50 CFR 424.12(e), we carefully reconsidered whether all unoccupied areas that we initially considered to be essential in our proposed rule are in fact integral to maintaining a sufficient community of pollinators to provide the essential life-history functions for the White Bluffs bladderpod. Upon reexamination, based on new information in our record, we conclude that some areas identified as unoccupied critical habitat in the previous designation were not pollinator habitat (e.g., gravel mining, cleared of native vegetation, extensive nonnative vegetation) or of such poor condition (fragmented, low quality, and/or disconnected) that their ability to maintain a sufficient community of pollinators of the White Bluffs bladderpod is compromised, and we have determined that these areas are not essential for the conservation of the species. None of these areas were included in this final revised designation.

Within the remaining unoccupied critical habitat in our April 23, 2013, designation, the largest contiguous area of high-quality native habitat available for pollinators is present on the Federal lands that are adjacent to or nearby habitat that we have determined is currently occupied by the White Bluffs bladderpod. We have concluded that these Federal lands within the areas designated as unoccupied critical habitat, combined with the areas of occupied critical habitat, which also support pollinators, comprise sufficient habitat to sustain a community of pollinators to provide for the essential life-history functions for the White Bluffs bladderpod. Thus, we have included only the unoccupied Federal lands in this revised final designation of critical

habitat for the White Bluffs bladderpod, based upon the Secretary's determination that such lands are essential for the conservation of the species.

As a result of this revision to the White Bluffs bladderpod critical habitat designation, as discussed above, the following acreages have been determined not to meet the definition of critical habitat: Federal lands 414 ac (167 ha); State lands 66 ac (27 ha); and private lands 315 ac (127 ha). The revised total acreage designated as critical habitat is 2,033 ac (823 ha), all of which are on Federal land.

Final Critical Habitat Designations

In our final critical habitat rule of April 23, 2013 (78 FR 24008), we provided background information on the designation of critical habitat and the criteria we used to identify critical habitat for Umtanum desert buckwheat and White Bluffs bladderpod. We also identified the PCEs of the physical and biological features essential to the conservation of each species in our final rule (78 FR 24008). We received no new information or comments during the second open comment period to suggest that our PCEs for either of these species should be modified from what was described in our final rule. We reaffirm these PCEs as determined in the final rule (78 FR 24008). Additionally, in our April 23, 2013, final critical habitat rule, we assessed whether the areas designated as critical habitat may require special management considerations and protections. We also reaffirm our assessment of special management considerations and protections provided in the final rule. We have not changed the critical habitat designation for Umtanum desert buckwheat identified in the final critical habitat rule (78

FR 24008), and, therefore, we are reaffirming our previous designation for Umtanum desert buckwheat.

We are designating one unit each as critical habitat for the Umtanum desert buckwheat and White Bluffs bladderpod populations. The revised designation for White Bluffs bladderpod is reflected in the map included in the rule portion of this document. The approximate sizes and ownerships of the White Bluffs bladderpod critical habitat unit are identified in Table 1.

Table 1.—Designated critical habitat for White Bluffs bladderpod (area estimates reflect all land within critical habitat unit boundaries; values are rounded to the nearest tenth.)					
Unit Name	Land Ownership	Occupied Critical Habitat in Hectares (Acres)	Unoccupied Critical Habitat in Hectares (Acres)	Percent by Ownership	Total Hectares (Acres)
White Bluffs, WA	Federal	46.5 (115.0)	776.3 (1,918.4)	100	822.9 (2,033.4)
Unit Total		46.5 (115.0)	776.3 (1,918.4)	100	822.9 (2,033.4)

Required Determinations

Required determinations were made in the final listing rule published on April 23, 2013 (78 FR 23984); we affirm those previous determinations in this document. We also made required determinations in the final critical habitat rule that was published on April 23, 2013 (78 FR 24008); we reaffirm these previous determinations as applicable to this final rule and provide additional explanation, if necessary, below.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

In our final critical habitat rule of April 23, 2013 (78 FR 24008), we certified and provided our rationale for certification that the critical habitat designation for White Bluffs bladderpod, which at the time included private lands in the designation, will not have a significant economic impact on a substantial number of small entities and that, as explained below, an analysis is not relevant to Umtanum desert buckwheat, because this species occurs exclusively on Federal land. Our reassessment of the final critical habitat designation for the White Bluffs bladderpod has resulted in reductions to the total area designated as critical habitat and only Federal lands are included in the designation.

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C 801 et seq.), and following recent court decisions, Federal agencies are required only to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the critical habitat rule will not have a significant economic impact on a substantial number of small entities.

In this affirmation of the final rule to designate critical habitat for Umtanum desert buckwheat and revision to the final rule to designate critical habitat for the White Bluffs bladderpod, the designation of critical habitat is entirely limited to Federal lands. Therefore, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will directly regulate only Federal agencies, which are not by definition small business entities. Based on the above reasoning and currently available information, we conclude that this rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for the Umtanum desert buckwheat and White Bluffs bladderpod will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Takings—Executive Order 12630

In our final critical habitat rule published on April 23, 2013 (78 FR 24008), we concluded that the designation of critical habitat for Umtanum desert buckwheat and White Bluffs bladderpod does not pose a significant takings implication for lands within or affected by the designation. We did not receive any public comments on the draft economic analysis during the first comment period on our critical habitat proposal (77 FR 28704). Comments on our draft economic analysis received during the second comment period are addressed in this final rule. We have considered these comments and reaffirm our conclusion that the designation of critical habitat for Umtanum desert buckwheat and

White Bluffs bladderpod does not pose a significant takings implication for lands within or affected by the designation.

References Cited

A complete list of all references cited in this final rule is available on the Internet at <http://www.regulations.gov>, or upon request from the Manager, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Author(s)

The primary authors of this final rule are the staff members of the Washington Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, we hereby further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as amended on April 23, 2013, at 78 FR 24008, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

2. In § 17.96, amend paragraph (a) by revising paragraph (5) and the map in the entry for “*Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod)” under Family Brassicaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

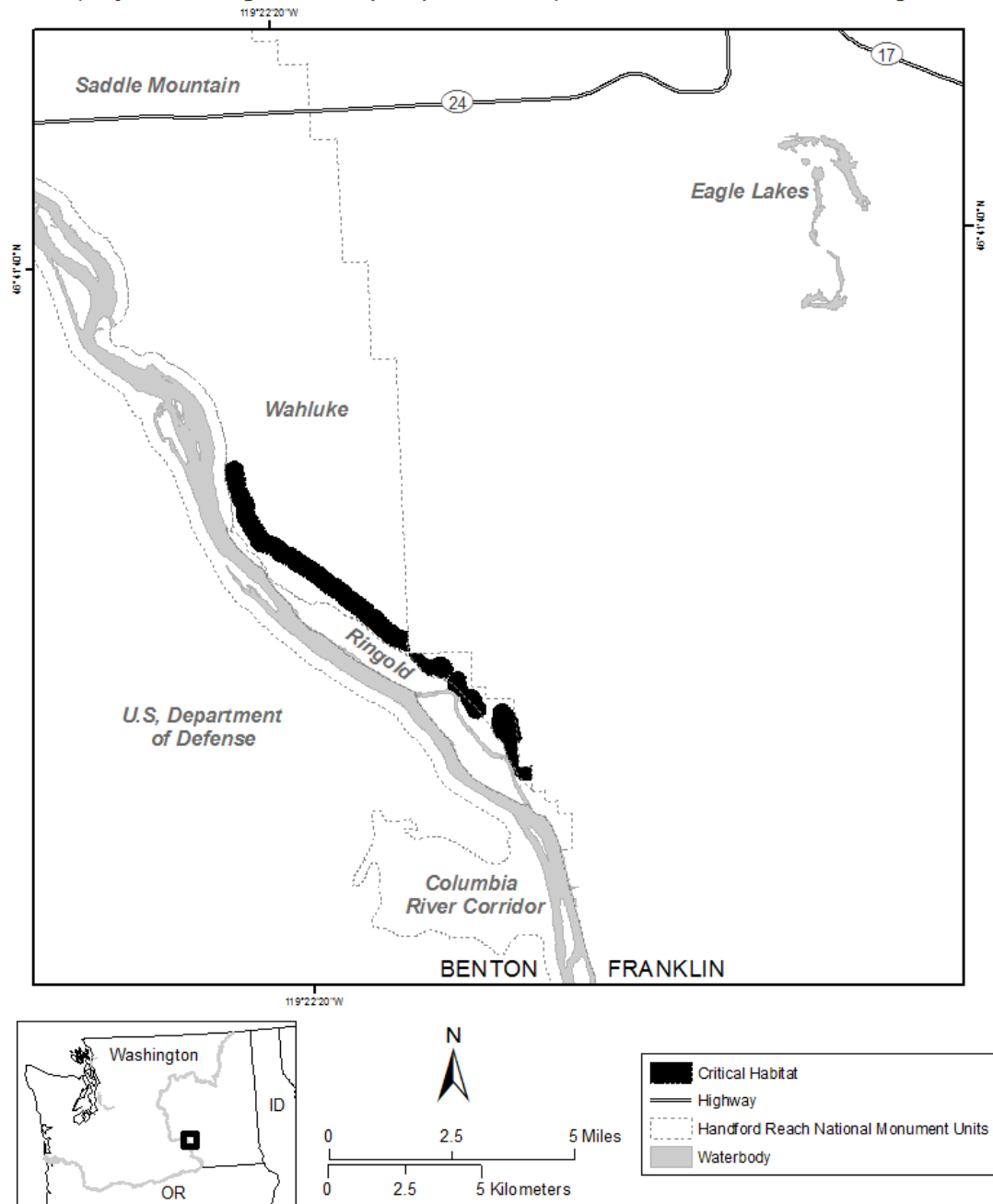
Family Brassicaceae: *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod)

* * * * *

(5) *Note:* Map of critical habitat for *Physaria douglasii* subsp. *tuplashensis*

(White Bluffs bladderpod) follows:

Critical Habitat for White Bluffs Bladderpod
(*Physaria douglasii* subsp. *tuplashensis*) Unit: White Bluffs, Washington



* * * * *

Dated: December 12, 2013

Signed: _____

Rachel Jacobsen

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55

~~[FR Doc. 2013-30164 Filed 12/19/2013 at 8:45 am; Publication Date: 12/20/2013]~~